U. S.
D
AUG 18 1975
CLERK

In The

Supreme Court of the United States

..... Term, 1974

No. 75-254

THE HONORABLE GEORGE B. DILLARD,
MUNICIPAL COURT FOR THE
CITY OF ROANOKE,

Petitioner,

v.

MARY WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
M. STUART BATEMAN
Assistant Attorneys General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Opinions Below	1-2
Jurisdiction	2
Question Presented	2
Statute Involved	2-3
Statement Of The Case	3-4
Argument	5-11
Conclusion	11
Certificate Of Service	12

TABLE OF CITATIONS

Cases

Alobaidi v. State, 433 S.W.2d 440 (Tex. Crim. App. 1968), cert. den. 393 U.S. 943 (1968)	8
Baker v. State, 16 Ariz. App. 463, 494 P.2d 68 (1972)	8
Cantwell v. Connecticut, 310 U.S. 296 (1940)	10
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	9
Coates v. City of Cincinnati, 402 U.S. 611 (1971)	10
Cohen v. California, 403 U.S. 15 (1971)	10
Colten v. Kentucky, 407 U.S. 104 (1972)	9
English v. Virginia Probation and Parole Board, 481 F.2d 188 (4th Cir. 1973)	9

Page

Gooding v. Wilson, 405 U.S. 518 (1972) 10

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 10

Jordan v. DeGeorge, 341 U.S. 223 (1951) 9

State v. Edwards, 261 La. 1014, 261 So.2d 649 (1972) 8

State v. Hertzog, 241 La. 783, 131 So.2d 788 (1961) 8

Walker v. Dillard, 353 F.Supp. 576 (W.D. Va. 1972) 2, 4

Walker v. Dillard, No. 73-1108 (4th Cir. June 20, 1973) 2, 4

Walker v. Dillard, 363 F.Supp. 921 (W.D. Va. 1973) 2, 4

Watts v. United States, 394 U.S. 705 (1969) 10

Other Authorities

Section 18.1-238, Code of Virginia (1950), as amended 2, 3

Black's Law Dictionary 1209 (Rev. 4th Ed. 1968) 9

For the purposes of brevity the petitioner is not listing the statutes of the other 49 states and the federal legislation pertaining to the issue present here. An alphabetized list of the state statutes may be found on pages *6* and *7*.

In The

Supreme Court of the United States

..... Term, 1974

No. .....

THE HONORABLE GEORGE B. DILLARD,
MUNICIPAL COURT FOR THE
CITY OF ROANOKE,

Petitioner,

v.

MARY WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

The Honorable George B. Dillard, Judge of the Municipal Court for the City of Roanoke, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on July 10, 1975, in the case styled *Mary Walker* v. *The Honorable George B. Dillard, Judge, Municipal Court of Roanoke*.

OPINIONS BELOW

The original decision of the United States District Court for the Western District of Virginia, Roanoke Division, is

reported as *Walker* v. *Dillard,* 353 F.Supp. 576 (W.D. Va. 1972) and it was reversed and remanded by the United States Court of Appeals for the Fourth Circuit in a memorandum decision in *Walker* v. *Dillard,* No. 73-1108 (4th Cir. June 20, 1973). The second opinion of the District Court is reported as *Walker* v. *Dillard,* 363 F.Supp. 921 (W.D. Va. 1973), and is included herein as Appendix A (App. 1). The opinion of the United States Court of Appeals for the Fourth Circuit, dated July 10, 1975, is as yet unreported, but is included herein as Appendix B (App. 17).

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari in this case is grounded on 28 United States Code § 1254(1).

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Reversing The Judgment Of The United States District Court For The Western District Of Virginia By Holding That § 18.1-238 Of The Code Of Virginia (1950), As Amended, Was Facially And Substantially Overbroad And In Granting Habeas Corpus Relief To The Respondent Herein?

STATUTE INVOLVED

Section 18.1-238, Code of Virginia, (1950), as amended

Use of profane, threatening or indecent language over telephone; duty of telephone companies.—If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor and may be prosecuted either in the county or city from which he called or in the county or city in which the call is received. It shall be the

duty of each telephone company in this State to furnish immediately in response to a subpoena issued by a court of record such information as it, its officers and employees, may possess which, in the opinion of the court, may aid in the apprehension of persons suspected of violating the provisions of this section. Any telephone company or any officer or employee thereof who shall fail or refuse to furnish such information when so requested, may be fined not more than one hundred dollars.

STATEMENT OF THE CASE

The respondent here, Mary Walker, hereinafter referred to as petitioner or by her proper name, was initially arrested on a warrant charging her with using "vulgar, profane, abusive and indecent language over the telephone" in violation of § 18.1-238 of the Code of Virginia (1950), as amended, said warrant being obtained by the individual to whom the language was addressed over the telephone. The petitioner was tried on August 25, 1971, in the Municipal Court for the City of Roanoke, Virginia, convicted, and sentenced to pay a fine of $25.00 and to serve 30 days in jail, with the jail sentence being suspended for a period of six months. The petitioner did not appeal her conviction to the then Hustings Court for the City of Roanoke, but instead executed a Petition for a Writ of Habeas Corpus only two days after the conviction, with said Petition being filed in the Supreme Court of Virginia. A show cause order was entered by the Supreme Court of Virginia on November 2, 1971, and, pursuant thereto, a Motion to Dismiss and an Amended Motion to Dismiss were thereafter filed on behalf of the habeas corpus respondent and petitioner filed further pleadings in replication to the responsive pleadings. By order of January 17, 1972, the Supreme Court of Virginia denied

and dismissed the Petition for a Writ of Habeas Corpus without filing any written opinion.

The federal Petition for a Writ of Habeas Corpus was executed on February 16, 1972, and filed in the United States District Court for the Western District of Virginia, Roanoke Division, on February 22, 1972. Responsive pleadings were thereafter filed on behalf of the habeas corpus respondent and, after memoranda were filed by both parties, the judge of the District Court entered an Order dismissing the Petition for a Writ of Habeas Corpus on procedural grounds (*Walker* v. *Dillard,* 353 F.Supp. 566 (W.D. Va. 1972)). This action of the District Court was subsequently reversed by the United States Court of Appeals for the Fourth Circuit on June 20, 1973, in *Walker* v. *Dillard*, No. 73-1108 (4th Cir. 1973), and the proceeding was remanded to the District Court for consideration on the merits. After further memoranda were filed in the court, the Petition for a Writ of Habeas Corpus was denied and dismissed by the District Court in *Walker* v. *Dillard*, 363 F.Supp. 921 (W.D. Va. 1973) (Appendix A). After briefing and oral argument in the United States Court of Appeals for the Fourth Circuit the decision complained of was entered in that Court on July 10, 1975, with said decision being included herein as Appendix B.

Since Mrs. Walker was tried in a court not of record and did not exercise her right to a de novo proceeding in the Hustings Court for the City of Roanoke, there is no transcript of the proceedings in the Municipal Court and there are, consequently, no facts before this Honorable Court beyond the recitation of prior proceedings referred to above.*

* There is specifically no information before the Court as to the language used by Mrs. Walker over the telephone.

ARGUMENT

The United States Court Of Appeals For The Fourth Circuit Erred In Its Conclusion That § 18.1-238 Of The Code Of Virginia (1950), As Amended, Is Unconstitutional On Its Face And That Mary Walker Was Improperly Convicted Thereunder And That Habeas Corpus Relief Should Be Granted.

This case presents for the Court's consideration a question regarding the constitutionality of a Virginia statute prohibiting the cursing or abusing or use of vulgar, profane, threatening or indecent language over a telephone within the state. Mrs. Walker was initially convicted in the Municipal Court of the City of Roanoke, Virginia on August 25, 1971, of using such language over the telephone in violation of § 18.1-238 of the Code of Virginia (1950), as amended. Mrs. Walker chose not to exercise her right to appeal the conviction to the then Hustings Court for the City of Roanoke but instead filed a Petition for a Writ of Habeas Corpus in the Supreme Court of Virginia and, upon the denial of relief by that Court, this federal habeas corpus proceeding was initiated by the execution of a Petition on February 16, 1972. Now, some 41 months later, she has been granted relief by a decision of the United States Court of Appeals for the Fourth Circuit based on the premise that the Virginia statute "is facially and substantially overbroad and may not be enforced until and unless a limiting construction or partial invalidation by the state courts so narrows it as to remove its threat to constitutionally protected expression" (App. 22). However, the constitutional significance of this case does not rest in the almost irrelevant grant of habeas corpus relief so as to invalidate the misdemeanor conviction of 1971, but rather in the fact that, so far as counsel can ascertain, it is the first reported decision of an appellate court, state or federal, that either invalidates or casts substantial doubt on the validity of

either a state or federal statute regulating the use of certain forms of speech over the telephone.

In 1968, the Congress of the United States enacted federal legislation covering obscene or harassing telephone calls in interstate or foreign commerce by the enactment of 47 U.S.C. § 223. At the time of this enactment, House Report No. 1109 pointed out that as of the time of passage, all 50 of the states had legislation that dealt with the problem of obscene, abusive or harassing telephone calls (1968 United States Code Congressional and Administrative News 1915-1922, esp. 1917). The House Report pointed out that during 1967 the Bell Telephone System had received some 641,821 complaints dealing with telephone calls that were of an obscene, harassing or threatening nature or which caused some form of interference and the report further pointed out that only 80 percent of the telephones in the United States were serviced by the Bell Telephone System so this number of complaints would have to be increased by those referred to other similar systems (Id. at 1916). The invasion of the privacy of one's home through the electronic medium of the telephone creates a unique and special problem which has no effective parallel in any other means of communication. The telephone is an essentially private and personal instrument and an individual's privacy or solitude may be invaded more dramatically through it than by any other means of communication. Consequently, the possible impact of the decision of the court below on the statutes of the other 49 states and the federal legislation is of sufficient magnitude to warrant consideration by this Court (See Ala. Code, Tit. 48, § 417 (3) (1973 Cum. Supp.); Alaska Stat. § 11.45.035 (1970); Ariz. Rev. Stat. Ann. § 13-895 (1973 Supp.); Ark. Stat. Ann. §§ 14-1437-1438 (1964 Repl. Vol.); Cal. Crim. Code § 653m (1970); Colo. Rev. Stat. Ann. § 18-9-306 (1973); Conn. Gen. Stat. Ann. § 53a-183

(1972); Del. Code Ann., Tit. 11, § 1312 (1953); Fla. Stat. Ann. § 365.16 (1975 Pocket Part); Ga. Code Ann. § 104-9901 (1974 Cum. Supp.); Hawaii Rev. Stat. §§ 759-2, 772-2 (10) (1968); Idaho Code §§ 18-6710-6711 (1974 Cum. Supp.); Ill. Rev. Stat., Tit. 134 §§ 16.4-16.5 (1974 Cum. Supp.); Ind. Ann. Stat. §§ 10-4944-4945 (1974 Cum. Supp.); Iowa Code Ann. §§ 714.37-714.40 (1975 Cum. Supp.); Kan. Stat. Ann. § 214113 (1974 Repl. Vol.); Ky. Rev. Stat. Ann. § 525.080 (1974 Cum. Supp.); La. Stat. Ann. § 14:285 (1974 Repl. Vol.); Me. Rev. Stat. Ann., Tit. 17, § 3704 (1974 Cum. Supp.); Md. Ann. Code, Art. 27, § 555A (1957); Mass. Gen. Laws Ann., see, § 14A (1970 Repl. Vol.); Mich. Comp. Laws Ann. §§ 750.540e (1975 Cum. Supp.); Minn. Stat. Ann. § 609.79 (1975 Cum. Supp.); Miss. Code Ann. § 97-29-45 (1972); Mo. Ann. Stat. §§ 563.910-563.920 (1975 Cum. Supp.); Mont. Rev. Codes Ann. § 94-8-114 (1973 Repl. Vol.); Neb. Rev. Stat. § 28-1127 (1972 Cum. Supp.); Nev. Rev. Stat. § 201.255 (1973 Repl. Vol.); N.H. Rev. Stat. Ann. § 644:4 (1974 Repl. Vol.); N.J. Stat. Ann. § 2A:170-20 (1971 Repl. Vol.); N.M. Stat. Ann. § 40A-20-8 (1964 Repl. Vol.); N.Y. Penal Laws § 240.30 (1974 Cum. Supp.); N.C. Gen. Stat. § 14-196 (1969 Repl. Vol.); N.D. Cent. Code § 8-10-07.1 (1973 Supp.); Ohio Rev. Code Ann. § 4931.31 (1974 Supp.); Okla. Stat. Ann., Tit. 21, § 1172 (1974 Supp.); Ore. Rev. Stat. § 166.065 (1973 Repl. Part); Pa. Stat. Ann. Tit. 18, § 5504 (1973); R.I. Gen. Laws Ann. § 11-35-17 (1969 Reen. Vol.); S.C. Code Ann. § 16-552.1 (1974 Cum. Supp.); S.D. Comp. Laws §§ 49-31-30-49-31-33 (1967); Tenn. Code Ann. § 39-3011 (1974 Cum. Supp.); Tex. Penal Code § 42.07 (1974); Utah Code Ann. § 79-9-201 (1973 Supp.); Vt. Stat. Ann., Tit. 13, § 1027 (1974 Repl. Vol.); Wash. Rev. Code Ann § 9.61.230 (1975 Pocket Part); W.Va. Code Ann. § 61-8-16 (1974 Cum. Supp.); Wis.

Stat. Ann. § 947.01 (1958 Repl. Vol.); Wyo. Stat. Ann. §§ 6-83.3 through 83.5 (1975 Cum. Supp.); D.C. Code Ann., Tit. 47, § 223 (1975 Supp.)).

A review of these various statutory provisions cited above can only leave the conclusion that many of the statutory schemes developed by the states to inhibit the unwarranted and unreasonable invasion of an individual's privacy by means of the telephone are subject to the same criticisms leveled by the Court of Appeals below at the Virginia statute. Thus, in light of the fact that the few decisions by appellate courts considering the constitutionality of statutes regulating the utilization of language or speech over the telephone have unanimously been in favor of such statutes, the impact of the decision of the Fourth Circuit Court of Appeals in this case may be significant (See, e.g., *Baker* v. *State*, 16 Ariz. App. 463, 494 P.2d 68 (1972); *State* v. *Edwards*, 261 La. 1014, 261 So.2d 649 (1972); *State* v. *Hertzog*, 241 La. 783, 131 So.2d 788 (1961); *Alobaidi* v. *State*, 433 S.W.2d 440 (Tex. Crim. App. 1968), cert. den. 393 U.S. 943 (1968)).

Mrs. Walker's specific objection to the Virginia statute was that it was unconstitutionally vague and overbroad and this conclusion was adopted by the Court below. The contentions of alleged vagueness and overbreadth were directed primarily at the terms utilized in the statute to describe prohibited language over the telephone. However, as the District Court so aptly pointed out, in an approach that was rejected by the Court of Appeals, these terms cannot be viewed in a vacuum but must be considered in the context of the entire statute and each term necessarily picks up coloration from each of the other terms. The District Court Judge used the doctrine of *noscitur a sociis* to posit that "the meaning of a word is or may be known from the accompanying words . . . the doctrine means that general and

specific words are associated with and take color from each other, restricting general words to sense analogous to less general." *Black's Law Dictionary* 1209 (Rev. 4th Ed. 1968). Utilizing this doctrine the terms "vulgar" and "threatening" are given a clear meaning and the terms used in the statute are all clearly terms that have been used frequently in other similar statutes which have been upheld over the years (Cf. *English* v. *Virginia Probation and Parole Board*, 481 F.2d 188 (4th Cir. 1973)).

This Honorable Court has pointed out in *Colten* v. *Kentucky*, 407 U.S. 104 (1972), that "the root of the vagueness doctrine is a rough idea of fairness" (407 U.S. at 110). This Honorable Court in the same decision went on to say that:

> "It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." (Ibid)

The essential test should be whether the language used in a statute conveys sufficiently definite warnings as to the proscribed conduct when measured by normal understanding and practices (*Jordan* v. *DeGeorge*, 341 U.S. 223, 231 (1951)). Similarly, Mrs. Walker complained as to overbreadth on the basis that the Virginia statute was overinclusive in its reach. As the district court judge pointed out, "it cannot be disputed that the state has a legitimate interest in prohibiting obscene and threatening calls, most of which by their very nature are anonymous and unsolicited." (363 F.Supp. at 927). In *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), this Honorable Court stated the following:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (315 U.S. at 571-572).

This was partially a reiteration of this Court's earlier holding two years before in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) wherein the Court stated:

> "Resort to epithets or personal abuse is not in any proper sense communication of information or opinions safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." (310 U.S. at 309-310).

The essential question may be, as the decision of the Court of Appeals impliedly noted, whether the considerable expansion of the meaning of the First Amendment by this Honorable Court over the past decade is to be applied wholesale to statutes regulating speech over the telephone (See *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974); *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Cohen* v. *California,* 403 U.S. 15 (1971); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971); *Watts* v. *United States,* 394 U.S. 705 (1969)). Another question, and one which was not involved in the decisions of this Court referred to above, is whether the public policy involved in this statute as applied solely to communications over a telephone amounts

to such a serious infringement on First Amendment rights as to cast substantial doubt on the constitutionality of the statute. As pointed out above, the telephone is a somewhat limited means of communication, dealing essentially with one-to-one communications, and the normal environments for protected free speech are not involved in the private nature of communications over a telephone. Consequently, it is respectfully submitted that the scholarly opinion of the district court judge was correct and the contrary conclusion of the United States Court of Appeals for the Fourth Circuit should be reviewed by this Honorable Court in light of the rather substantial possible impact of the Court of Appeals' decision on the statutes of states other than Virginia.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
M. STUART BATEMAN
Assistant Attorneys General

Supreme Court–State Library Building
Richmond, Virginia 23219

APPENDIX

APPENDIX A

(Key) WEST KEY NUMBER SYSTEM

Mary Walker,

Petitioner,

v.

Honorable George B. Dillard, Judge, Municipal Court, City of Roanoke,

Respondent.

Civ. A. No. 72-C-28-R

United States District Court, W. D. of Virginia, Roanoke Division

---

Aug. 30, 1973

Petition for habeas corpus. On first filing, the petition was denied, 353 F.Supp. 566. The Court of Appeals reversed. After remand, the District Court, Dalton, Chief Judge, held that the Virginia two tiered system of lower courts that allows for "appeals" as matter of right from court not of record to a court in which a trial de novo may be heard by a jury did not deny petitioner, who had been convicted of violating statute prohibiting profane, threatening or indecent language over the telephone, of right to trial by jury, that the right of the Virginia court of record to impose greater sentence than that imposed by court not of record did not have chilling effect on right to appeal and did not constitute denial of trial by jury and that the Virginia statute which prohibits use of profane, threatening or indecent language over telephone was not void for vagueness.

Petition dismissed.

1. Habeas Corpus (Key) 45.3(2)

Where petitioner presented the same issues raised in her petition for federal habeas relief in petition for habeas corpus in the Supreme Court of Virginia and the Virginia court denied and dismissed the petition, petitioner had exhausted her available state remedies. 28 U.S.C.A. § 2254.

2. Jury (Key) 35(2)

Where accused, charged with use of profane, threatening or indecent language over telephone, had right to appeal to the Hustings Court of the City of Roanoke from conviction in bench trial before Municipal Court of Roanoke and would have obtained a trial by jury before the Hustings Court in a de novo proceeding, the right to jury trial was not denied because she could not have jury trial in the first instance at the level of the court not of record. Code Va. 1950, §§ 16.1-1 et seq., 18.1-238; U.S.C.A. Const. Amends. 1, 5, 6, 14; 28 U.S.C.A. §§ 2241, 2254; Const. 1971, art. 1, § 8.

3. Jury (Key) 35(2)

Virginia's two tiered system of courts is constitutionally permissible and does not deny trial by jury, even if conviction at second level results in a greater sentence. U.S.C.A. Const. Amends. 5, 6, 14; Const. 1971, art. 1, § 8; Code Va. 1950, § 16.1-1 et seq.

4. Jury (Key) 11(3)

Requirement that jury be available to defendant in first instance of trial is a federal jury standard and applicable only to the federal courts. U.S.C.A. Const. Amend. 6.

5. Criminal Law (Key) 248

Power of Virginia court of record to impose more severe sentence than court not of record if defendant appeals from conviction in the court not of record did not have chilling effect on right to appeal and was not unconstitutional. Code Va. 1950, §§ 16.1-1 et seq., 18.1-238; U.S.C.A. Const. Amends. 1, 5, 6, 14; 28 U.S.C.A. §§ 2241, 2254; Const. 1971, art. 1, § 8.

6. Jury (Key) 35(2)

The power of Virginia court of record to impose more severe sentence than court not of record if convicted defendant appeals does not place unconstitutional condition upon exercise of right to trial by jury. Code Va. 1950, §§ 16.1-1 et seq., 18.1-238; U.S.C.A. Const. Amends. 1, 5, 6, 14; 28 U.S.C.A. §§ 2241, 2254; Const. 1971, art. 1, § 8.

7. Habeas Corpus (Key) 45.2(2)

Federal habeas corpus proceeding is proper method to test contention that state statute under which defendant is convicted is unconstitutional, even though that argument has been rejected by the state's highest court. 28 U.S.C.A. § 2241.

8. Criminal Law (Key) 13.1(3)

Virginia statute which prohibits the use of profane, threatening or indecent language over telephone is not void for vagueness and overbreadth. U.S.C.A. Const. Amends. 1, 14; Code Va. 1950, § 18.1-238.

9. Constitutional Law (Key) 48(4)

Where state legislative act is challenged as being violation of a First Amendment guarantee, presumption exists against the validity of the statute. U.S.C.A. Const. Amend. 1.

10. Criminal Law (Key) 13.1(3)

The use of the word "vulgar" within Virginia statute which prohibits one from cursing or abusing anyone or using vulgar, profane, threatening or indecent language over any telephone, was sufficiently explicit to inform one of common intelligence of its meaning. Code Va. 1950, § 18.1-238; U.S.C.A. Const. Amend. 1.

11. Criminal Law (Key) 13.1(3)

The word "threatening" within Virginia statute prohibiting use of profane, threatening or indecent language over telephone was sufficiently explicit to inform one of common intelligence of its meaning. Code Va. 1950, § 18.1-238; U.S.C.A. Const. Amend. 1.

12. Criminal Law (Key) 13.1(1)

The "void for vagueness" doctrine does not require impossible standards of specificity; the test is whether the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices.

13. Telecommunications (Key) 361

Virginia statute which prohibits use of profane, threatening or indecent language over telephone was not invalid on ground that the means used by the state to prohibit obscene and threatening telephone calls was overinclusive in its reach. Code of Va. 1950 § 18.1-238; U.S.C.A. Const. Amend. 1.

14. Constitutional Law (Key) 90.1(9)
Telecommunications (Key) 361

The state has legitimate interest in prohibiting obscene

and threatening telephone calls and prohibiting certain forms of speech is a rational means of enforcing that interest. Code Va. 1950, § 18.1-238; U.S.C.A. Const. Amend. 1.

David G. Karro, Legal Aid Society of Roanoke Valley, Roanoke, Va., for petitioner.

Robert E. Shepherd, Asst. Atty. Gen., Richmond, Va., for respondent.

OPINION and JUDGMENT

DALTON, Chief Judge.

On August 25, 1971, the petitioner was convicted by the respondent, Judge George B. Dillard, in the Municipal Court for the City of Roanoke for having violated § 18.1-238, as amended, of the Virginia Code (1960 Repl. Vol.).[1] She was sentenced to serve thirty days in jail, which sentence was suspended for six months, and required to pay a twenty-five dollar fine and costs. Following her conviction, petitioner on August 27, 1971, filed a petition for a writ of habeas corpus in the Supreme Court of Virginia. That court denied relief and dismissed the petition in an order dated January 17, 1972.

Petitioner then filed in this court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Leave to proceed *in forma pauperis* was granted by order of February 22, 1972.

---

[1] § 18.1-238, as amended, reads in pertinent part: Use of profane, threatening or indecent language over telephone; duty of telephone companies.—If any person shall curse or abuse anyone or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor and may be prosecuted either in the county or city from which he called or in the county or city in which the call is received. * * *

[1] Petitioner complains in her petition that: (1) she was denied her constitutional right to a trial by jury in the Municipal Court of the City of Roanoke; (2) her failure to seek a trial *de novo* was not a voluntary waiver of the right to trial by jury; and (3) § 18.1-238 of the Code of Virginia violates the First, Fifth and Fourteenth Amendments to the United States Constitution in that it is vague and overbroad. These same issues were raised in the petition for a writ of habeas corpus in the Supreme Court of Virginia, which was denied and dismissed. Therefore petitioner has exhausted her available state remedies in compliance with the provisions of 28 U.S.C. § 2254.

This court originally dismissed the petition on the grounds of lack of jurisdiction. The Court of Appeals for the Fourth Circuit reversed (Mem. Dec. No. 73-1108), holding that the thirty-day suspended sentence and twenty-five dollar fine constituted sufficient "restraint" to put the petitioner "in custody" within the meaning of the habeas statutes (28 U.S.C. §§ 2241 and 2254). The case is now before this court on remand to consider the substantive grounds presented by the petition.

TRIAL BY JURY

The Municipal Court of Roanoke is a court not of record, created by Title 16.1 of the Virginia Code, and as such, could not accord petitioner a trial by jury. Because the maximum penalty for violating § 18.1-238 is more than six months imprisonment, petitioner contends that she was entitled to a trial by jury under the Sixth and Fourteenth Amendments, citing Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

Virginia, like many other states, has a two-tiered system of lower courts that allows for an "appeal" as a matter of right from a court not of record to a court in which a trial

de novo may be heard by a jury. This right is embodied in Article 1, § 8 of the Constitution of Virginia, which reads in part:

> Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to appeal to and a trial by jury in some court of record having original criminal jurisdiction.

Petitioner therefore had a right to appeal to the Hustings Court of the City of Roanoke, and could have obtained a trial by jury before that court in a *de novo* proceeding. Instead, petitioner chose to proceed by way of a writ of habeas corpus to the Supreme Court of Virginia. Petitioner now contends that her right to a jury trial was denied, because she could not have it at the first instance, at the level of the court not of record.

[2] With this proposition we cannot agree. The recent case of Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) forecloses this argument. The facts in *Colten* are very similar to those in the case at hand. The appellant in *Colten* was tried and convicted of disorderly conduct in an "inferior" court in Kentucky and fined ten dollars. Kentucky has a two-tiered system for adjudicating certain criminal cases, under which a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general criminal jurisdiction, where he risks a greater punishment if convicted. Exercising his right to a trial *de novo,* the appellant in *Colten* was tried for disorderly conduct in the circuit court, convicted, and fined fifty dollars. The Supreme Court held that the two-tiered system[2]

[2] The Court took note of Virginia's system. Colten v. Kentucky, at 112 n. 4, 114 n. 10, 115 nn. 12, 13, 92 S.Ct. 1953.

does not violate the Due Process Clause, as it imposes no penalty on those who seek a trial *de novo* after having been convicted in the inferior court, and it involves a completely fresh determination of guilt or innocence by the superior court. *Colten, supra,* at 112-119, 92 S.Ct. 1953. Granted, the Kentucky procedure entitled the appellant to a six-man jury at the initial trial level, *Colten,* at 113, 92 S.Ct. 1953, but the appellant had waived that right, and in view of the language of the Supreme Court, we do not view this a feature to be distinguished from the case at hand.

[3] Petitioner contends that the holding in the case of Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888), in which the Supreme Court held that the Sixth Amendment was not satisfied by the availability of a trial *de novo* to persons in the District of Columbia convicted in the first instance by courts unable to accord them trials by jury, should be binding upon the states. This court disagrees. Colten v. Kentucky, *supra,* clearly holds that the state two-tiered system is permissible, even if a conviction at the second level results in a greater sentence.

The procedure afforded by Virginia for the petitioner to obtain a trial by jury is fully within the requirements of Baldwin v. New York, *supra.* Justice White has cited two justifications for the type of tribunals not of record that are utilized by Virginia. First, they provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction; and second, the defendant has an unconditional right to a new, unfettered trial in a superior court. Colten v. Kentucky, 407 U.S. at 114, 92 S.Ct. 1953.

The precursor of Baldwin v. New York, the case of Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) extended the Sixth Amendment right of trial by

jury to trials in state courts, using the Due Process Clause of the Fourteenth Amendment. In his concurring opinion in that case, Mr. Justice Fortas stated very well why the two tiered system is permissible:

> The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the states. Our Constitution sets up a federal union, not a monolith. 391 U.S. 213-214, 88 S.Ct. 1460.

[4] Since the holdings in *Duncan* and *Baldwin,* the jury trial standards imposed on the federal courts for a twelve-man jury, Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898) and unanimous verdict, Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900), have been held inapplicable to prosecutions in state courts by Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) and Apocada v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). This court likewise holds that Callan v. Wilson, *supra,* requiring a jury in the first instance, to be a federal jury standard and applicable only to the federal courts. The Supreme Court of Virginia has reached the same conclusion in Manns v. Commonwealth, 213 Va. 322, 191 S.E.2d 810 (1972), holding that the appeal of

right and the trial *de novo* procedure employed by Virginia fully complied with the guarantee of the Sixth Amendment.

RIGHT TO APPEAL

[5] Petitioner next contends that the power of the Virginia court of record to impose a more severe sentence, had she appealed, had a chilling effect on her right to appeal, and that her failure to appeal was consequently a result of fear, and not voluntary. This court finds no merit in this contention. As respondent correctly notes, there is an element of risk involved at all stages of the criminal justice process, and all that the Constitution prohibits is an unreasonable or unconstitutional injection of fear which would improperly influence her decision. Petitioner concedes that Colten v. Kentucky, *supra*, has established the proposition that in a trial *de novo*, the second court may impose a greater penalty than the first. As long as petitioner is entitled to a fresh determination of her guilt or innocence by the superior court, which is not the same court which originally tried the case, an enhanced sentence on reconviction is not prohibited. *Colten*, 407 U.S. at 119, 92 S.Ct. 1953.

[6] This court is of the opinion that the choice put to petitioner did not place an unconstitutional condition on her exercise of the right to a trial by jury. The Constitution does not dictate that a defendant and his attorney are never to be put to hard decisions regarding which trial tactics should be employed. *Cf.* North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

CONSTITUTIONALITY

[7] Petitioner lastly contends that § 18.1-238 of the Virginia Code, as amended, under which she was convicted, is void for vagueness and overbreadth. If this position is

well taken, then petitioner's conviction is not merely erroneous, but is illegal and void. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). A federal habeas corpus proceeding is a proper method to test the contention that § 18.1-238 is unconstitutional, even though that argument was rejected by the state's highest court. *Cf.* McLaurin v. Burnley, 279 F.Supp. 220 (N.D. Miss. 1967), aff'd, 401 F.2d 773 (5th Cir. 1968) (per curiam), cert. denied, 399 U.S. 928, 90 S.Ct. 2228, 26 L.Ed.2d 795 (1970).

This court is hesitant to address this issue for two reasons. The first is that we lack any record of how this statute was applied in the instant case, since the proceedings below were before a court not of record. Secondly, the Supreme Court of Virginia has not authoritatively dealt with the statute. The only instance that brought the statute before that court was in Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969), where, *inter alia*, it held that the evidence of repeated obscene telephone calls was sufficient to support a conviction under § 18.1-238, but it did not otherwise construe its application.

[8] Nevertheless, since petitioner argues that the statute is invalid on its face, we must address this issue. *Cf.* Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1971); Dombroski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). This court does not question petitioner's standing to raise the issue. *Cf.* Freeman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). But as the Supreme Court noted in Younger v. Harris, 401 U.S. 37, 47 n. 4, 91 S.Ct. 746, 752 n. 4, 27 L.Ed.2d 669 (1971), even though it allowed attacks on overly broad or vague statutes in the absence of any showing that the defendant's conduct could not be regulated by some properly drawn statute

> . . . in each of these cases the statute was not merely vague or overly broad 'on its face'; the statute was held to be vague or overly broad as construed and *applied* to a particular defendant in a particular case. (Emphasis in original)

This court lacks any record of how the statute in the instant case was applied. We are thus left to speculate upon the possible implications of bare statutory language.

[9] Petitioner is particularly insistent that the words "vulgar" and "threatening" are insufficiently explicit to inform men of common intelligence what conduct on their part will render them liable for the penalties of § 18.1-238, and are so vague as to make them guess at their meaning and differ as to their application. Since the legislative act challenged here is allegedly in violation of a First Amendment guarantee, the presumption is against the validity of the statute. United States v. C.I.O., 335 U.S. 106, 140, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (J. Rutledge, concurring).

Nevertheless, this court is unconvinced that the statute is neither impermissibly vague or overbroad. We perceive no violation of "[t]he underlying principle . . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954); *cf.* Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

All fifty states now have variously worded statutes of a nature similar to § 18.1-238 of the Virginia Code.[3] 1968

[3] The statutes of the other states in this judicial circuit are virtually synonymous in their language prohibiting the use of certain forms of language over the telephone (all but Maryland prohibit "profane" and "vulgar" language; Maryland prohibits "filthy" and "obscene" language). *See* Maryland Code, Art. 27, § 555A (1971 Rep.Vol.); N. Car.Gen.Stat., Ch. 14, 196.1 (1969 Rep.Vol.); Code of Laws of S.Car., § 16-552.1 (1967 rev.); W.Va.Code, § 61-8-16 (1967 rev.).

U.S. Code Congressional and Administrative News, at 1917. The statutes of some of those states previously have been interpreted by the state courts (cases *infra*). An argument similar to that urged by petitioner was made in the case of States v. Hertzog, 241 La. 783, 131 So.2d 788 (1961). The defendant in *Hertzog* was charged with violating the Louisiana statute which, in part is cited at 788:

> No person shall engage in or institute a local telephone call, conversation or conference of an anonymous nature and therein use obscene, profane, vulgar, lewd, lascivious or indecent language, suggestions or proposals of an obscene nature and threats of any kind whatsoever.

The defendant contended that because of the indefiniteness of the word "vulgar" the statute on which the charge against him was based was unconstitutional insofar as it denounced the use of "vulgar" language. The court used the rule *noscitur a sociis* in deciding that the world "vulgar" should be considered in the context of the other words with which it is used, and be colored by them. That court determined that "vulgar" in context was defined by the accompanying adjectives, and its presence did not render the statute unconstitutional.[4] In Black's Law Dictionary 1209 (rev. 4th Ed. 1968) the rule of *noscitur a sociis* is declared to be as follows:

> It is known from its associates. * * * The meaning of a word is or may be known from the accompanying words. * * * The doctrine means that general and specific words are associated with and take color from each other, restricting general words to sense analogous

[4] The Louisiana statute was recently re-examined and upheld in State v. Edwards, 261 La. 1014, 261 So. 649 (1972).

> to less general. Dunham v. State, 140 Fla. 754, 192 So. 324, 325.

Cf. United States v. Lewis, 110 F.2d 460, 462 (7th Cir. 1940), cert. denied, 310 U.S. 634, 60 S.Ct. 1077, 84 L.Ed. 1404 (1940).

[10, 11] In applying this general principle, this court is of the opinion that the word "vulgar" when used in connection with the other words in the statute capable of analogous meaning is not so insufficiently explicit to inform one of common intelligence of its meaning. We are of the same opinion as to the use of the word "threatening," which was added to § 18.1-238 by amendment in 1964 (Chapter 577). The Texas Court of Criminal Appeals has upheld the constitutionality of the Texas statute which prohibited the use of "threatening" language.[5]

As the Supreme Court has recently noted in a First Amendment issue, "the root of the vagueness doctrine is a rough idea of fairness." Colten v. Kentucky, *supra,* 407 U.S. at 110, 92 S.Ct. at 1957 and

> It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. 407 U.S. at 110, 92 S.Ct. at 1957.

[12] Impossible standards of specificity are not required. Jordan v. DeGeorge, 341 U.S. 223, 231, 71 S.Ct. 703, 95

[5] The Texas statute reads in part: Whoever * * * uses any telephone in any manner with intent to harass, annoy, torment, abuse, threaten or intimidate another * * * shall be guilty of a misdemeanor. Alobaidi v. State, 433 S.W.2d 440, 441 (Ct.Crim.App.Tex.1968), cert. denied, 393 U.S. 943, 89 S.Ct. 313, 21 L.Ed.2d 281 (1968).

L.Ed. 886 (1951). The test is whether the language conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. 341 U.S. at 231, 71 S.Ct. 703.

[13, 14] Petitioner also contends that the statute is overbroad and repugnant to the concept of free speech in that it prohibits certain forms of language (speech) over the telephone, rather than improper uses of the telephone (conduct), and forbids the use of language, which, it is contended, is neither criminal in and of itself, nor part of a criminal act. In other words, petitioner asserts that the means used by the state to prohibit obscene and threatening telephone calls, as we perceive the purpose of § 18.1-238, is overinclusive in its reach, and therefore illegal. With this contention we cannot agree. It cannot be disputed that the state has a legitimate interest in prohibiting obscene and threatening calls, most of which by their very nature are anonymous and unsolicited. Prohibiting certain forms of speech, as the Commonwealth has, is not only a rational means of enforcing the objective of the statute, it is probably the only means by which it can be accomplished.

"[T]he right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942). As the court said in *Chaplinsky,* at 571-572, 62 S.Ct. at 769:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These included the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the

> peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

In balance, this court is of the opinion that the public interest in being safeguarded against the abuses to which it may be subjected to by indiscriminate usage of the telephone clearly outweighs whatever marginal interest an individual would have in utilizing the forms of speech proscribed by § 18.1-238. We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute rather narrowly drawn and limited to define and punish specific conduct lying within the domain of state power. This conclusion necessarily disposes of petitioner's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process.

For the foregoing reasons, it is adjudged and ordered that the petition for a writ of habeas corpus be dismissed and the writ denied.

A certified copy of this opinion and judgment is directed to be sent to the petitioner and to the respondent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1108

Mary Walker,

Appellant,

versus

The Hon. George B. Dillard, Judge,
Municipal Court of Roanoke,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke, Ted Dalton, District Judge.

Argued December 5, 1974. Decided July 10, 1975

Before Haynsworth, Chief Judge, Butzner, Circuit Judge, and Thomsen, District Judge.

David G. Karro [Court-appointed counsel] (Henry L. Woodward, Legal Aid Society of Roanoke Valley, on brief) for Appellant; Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, on brief), for Appellee.

Haynsworth, Chief Judge

This case arises out of a telephone argument between the appellant, Mary Walker, and one of her neighbors over the behavior of Mrs. Walker's children. After the conversation

Mrs. Walker was convicted in the Municipal Court of the City of Richmond, Va., of Violating Virginia Code § 18.1-238.[1] Mrs. Walker subsequently sought habeas relief in the district court[2] claiming that the statute is void for vagueness and overbreadth and that her right to a jury trial was violated by the inability of the Municipal Court to afford a trial by jury.[3] The district court dismissed the petition,[4] 363 F.Supp. 921, and this appeal ensued. We conclude that Mrs. Walker could not constitutionally be convicted under Section 18.1-238 because the statute is facially overbroad. Accordingly, we reverse the decision below and order that a writ of habeas corpus issue.

We start from the proposition that the state has a legitimate interest in prohibiting obscene, threatening, and harassing phone calls, none of which are generally thought of as protected by the First Amendment. *Cf. Miller* v. *California*, 413 U.S. 15 (1973); *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970); *Watts* v. *United States*, 394 U.S. 705 (1969). Nevertheless, while such activity may permissibly

[1] Section 18.1-238 provides in pertinent part:

> "If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor * * *."

[2] Mrs. Walker did not appeal her conviction but instead filed a Petition for a Writ of Habeas Corpus in the Supreme Court of Virginia, which summarily denied the petition. She thus has exhausted her state remedies. *See Kane* v. *Virginia*, 414 F.2d 1369 (4th Cir. 1970).

[3] A person convicted in a court not of record must seek a trial de novo on appeal if he wishes to be tried by a jury. *See* Virginia Code § 16.1-132; *Gaskill* v. *Commonwealth*, 206 Va. 486, 144 S.E.2d 293 (1965). Mrs. Walker claims she is entitled to a jury trial in the first instance, arguing that the rule of *Callan* v. *Wilson*, 127 U.S. 540 (1888) is incorporated into the Fourteenth Amendment.

[4] An earlier dismissal on procedural grounds, 353 F.Supp. 566, was reversed and remanded by this Court in *Walker* v. *Dillard*, No. 73-1108 (4th Cir. June 20, 1973).

be punished, the proscription must not be one that unduly impinges on protected expression. *E.g., Gooding* v. *Wilson*, 405 U.S. 518, 522 (1972).

One in the position of Mrs. Walker may raise the overbreadth issue even though the language she used might have been constitutionally prohibited under a narrowly and precisely drawn statute.

> At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," * * * the transcendent value to all society is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity" * * * . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Lewis v. *City of New Orleans*, 415 U.S. 130, 133-34 (1974). *See also Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971).

That the statute challenged here presents such a case is apparent. The Supreme Court of Virginia has thus far declined to place a narrowing construction on the sweeping language of Section 18.1-238, which regulates only speech.[5] On its face the statute prohibits abusive comment about third parties, curses or abuses directed at unsolicited callers, and "vulgar" or "profane" discussion of virtually everything and

[5] In *Harmon* v. *Commonwealth*, 209 Va. 574, 166 S.E.2d 232 (1969), the only other case cited in the annotation to the section, the court held that evidence of repeated obscene calls was sufficient to support a conviction but did not otherwise construe the statute.

everyone. The statute does not reach the anonymous midnight caller who only breathes into the mouthpiece, unless repeated calls might be said to be abusive, but it makes punishable an indiscreet response from the outraged recipient of that call. An intemperate expression of understandable and wholesome indignation would be within the statute's apparent reach, but the words of many an anonymous, harassing caller would not.

Nearly every operative word of the statute is susceptible of an overbroad construction, and several have been stricken at one time or another for indefiniteness.[6] Thus, in *Watts* v. *United States,* 394 U.S. 705 (1969), the Supreme Court acknowledged that the word "threat" must be narrowly defined in order to avoid punishing constitutionally protected speech. The Court construed 18 U.S.C. § 871(a) so as to exclude Watts' statement, which it characterized as crude and offensive political hyperbole, because Congress could not have intended to inhibit robust debate which, in the political arena, is often vituperative, abusive, and inexact. It is significant that the Virginia statute on its face authorizes punishment of Watts' statement, which was "abusive" if not "threatening." And, in *Gooding* v. *Wilson,* 405 U.S. 518 (1972) the Court held facially unconstitutional a Georgia statute proscribing "opprobrious words or abusive

[6] One whose conduct is clearly proscribed may not successfully challenge a statute for vagueness. *Parker* v. *Levy,* 417 U.S. 733 (1974). In our view Mrs. Walker is barred from raising vagueness, as that term is precisely used, because she has brought up no record of the proceedings in the Municipal Court. Nevertheless, the vagueness and overbreadth doctrines are often functionally indistinguishable, and the chilling effect caused by the imprecision of the terms used in Section 18.1-238 can scarcely be separated from that which results solely from the overbreadth of the statute. *See generally,* Note, the First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871-75 (1960).

language" because the statute had not been narrowed by the state courts to apply only to "fighting words."[7]

The words "vulgar," "profane," and "indecent" are also capable of overbroad interpretation. The message on Paul Robert Cohen's jacket in *Cohen* v. *California,* 403 U.S. 15 (1971), was unquestionably vulgar, but it was nonetheless protected since it amounted to neither obscenity nor fighting words. We do not doubt that if the words were construed to prohibit only obscenity they could stand. *E.g., Roth* v. *United States,* 354 U.S. 476 (1957). The courts of Virginia, however, have not supplied such a construction, without which Section 18.1-238 facially proscribes intemperate political commentary such as Cohen's or Watts'.

In light of the foregoing, we are constrained to conclude that the statute is impermissibly sweeping. Indeed, the district court recognized the statute's overbreadth for it felt obliged to construe it as proscribing only obscene and threatening calls before upholding it as constitutional. This conclusion was reached by application of the rule of *noscitor a sociis*—general and specific words are associated with and take color from each other, so that the general words are restricted to senses that are analogous to the more specific words. 363 F.Supp. at 927, *quoting* Black's Law Dictionary 1209 (Rev. 4th ed. 1968). We believe the court erred in so holding. First, we doubt the power of federal courts to

[7] We need not decide the extent to which the "fighting words" cases might be altered in the context of a telephone conversation: One may have a greater interest in freedom from abuse in his own home than when he takes to the streets, but, conversely, there is little likelihood of an immediate breach of the peace when one can abruptly hang up the receiver. It sufficies for our purposes to observe that the words "abusive" and "threatening" standing alone are unconstitutionally overbroad. Nor are we confronted with the question whether a statute may regulate the speech of unsolicited callers more broadly than that of recipients of such calls, for the statute draws no such distinction. Compare the Federal legislation, 47 U.S.C. § 223.

supply limiting constructions of state statutes. "Only the [state] courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.' " *Gooding* v. *Wilson,* 405 U.S. 518, 520 (1972); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971). Moreover, it is far from clear that the Virginia court would hold that the general words of the statute are made more specific by their conjunction with other general words. Words like "vulgar," "profane," and "indecent" have sometimes been interpreted as meaning "obscene," but only when they have been used in conjunction with other, more specific adjectives like "obscene," "lewd" and "lascivious." *See, e.g. Roth* v. *United States,* 354 U.S. 476 (1957); *Winters* v. *New York,* 333 U.S. 507 (1948). Indeed, the district court, in concluding that the presence of the word "vulgar" does not render the statute unconstitutional, relied upon a decision upholding the Louisiana Statute, which prohibits anonymous calls involving "obscene, profane, vulgar, lewd, lascivious, or indecent language, suggestions, or proposals of an obscene nature * * *." *State* v. *Hertzog,* 241 La. 783, 131 So. 2d 788 (1961). Similarly, as to the word "threatening," the court relied upon an opinion upholding the Texas statute, which prohibits use of a telephone "with intent to harass, annoy, torment, abuse, threaten, or intimidate another * * *." *Alobaidi* v. *State,* 433 S.W. 2d 440 (Ct. Crim. App. Tex. 1968) *cert. denied* 393 U.S. 943 (1968). Section 18.1-238 provides no specific adjectives corresponding to those in the statutes cited above and for that reason is patently different.

Accordingly, we hold that Mrs. Walker's detention is illegal because Virginia Code § 18.1-238 is facially and substantially overbroad and may not be enforced until and unless a limiting construction or partial invalidation by the state courts so narrows it as to remove its threat to constitutionally protected expression. See *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973).

In light of our disposition of the case, it is unnecessary for us to reach Mrs. Walker's claim that Virginia's two-tier court system denies her right to a jury trial.

REVERSED.